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August 1, 2002

EX PARTE – Via Electronic Filing

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Chairman Powell's Senate testimony  
CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

The attached letter was sent to Chairman Powell today.

In accordance with FCC rules, a copy of this letter is being filed electronically in the above-captioned dockets.

Sincerely,

/s/

Thomas M. Koutsky

/spc  
Attachment



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August 1, 2002

**Ex Parte**

Hon. Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12th Street, S.W., Room 8-B201  
Washington, DC 20554

Re: Your Senate Testimony on Financial Turmoil in the Telecommunications  
Marketplace, CC Docket Nos. 01-338, 96-98, and 98-147

Dear Chairman Powell:

We write to applaud your testimony this week before the Senate Commerce, Science and Transportation Committee. You correctly recognized that “to facilitate a recovery, we must understand what led to the current turmoil in the market.”<sup>1</sup> As you stated, the “Field of Dreams” mentality premised on “build it and they will come” business models led to the current problems: telecommunications companies “amassed staggering amounts of debt in building nearly-identical networks” and “[t]he results were devastating.”<sup>2</sup>

In order to ensure the “effective and sustainable competitive entry” you told the Committee was needed to draw the telecommunications industry out of its current downturn, we urge you to adopt a “Customers-First” regulatory paradigm. This regulatory approach should include measures that will allow competitive entrants to build mass-market customer bases and cash-flow by using the UNE Platform. At the same time, retail rate rebalancing and pricing

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<sup>1</sup> Written Statement of Michael K. Powell, Chairman, Federal Communications Commission, on “Financial Turmoil in the Telecommunications Marketplace: Maintaining the Operations of Essential Communications,” before the Committee on Commerce, Science, and Transportation, United States Senate, July 30, 2002 (“Chairman Powell’s Senate testimony”), at 7.

<sup>2</sup> *Id.* at 8.

flexibility should be implemented for incumbents. As you stated in your Senate testimony, regulators should “consider rate rebalancing” and “Nowhere is this more pressing than in local markets,” where “the economic foundations remain weak.”<sup>3</sup> Both steps are necessary pre-conditions to the production of an “efficient wholesale market.”<sup>4</sup> Not only will this paradigm result in effective and sustainable competitive entry, it will also set the stage to loosen retail regulatory restrictions upon incumbents. Implemented correctly, customers will win because they will see an immediate choice in innovative services and competition sufficient to check the incumbents’ market power.

The New York Public Service Commission (“NYPSC”) recently adopted a settlement between Verizon and competitors that should serve as a model for the regulatory reform you envision.<sup>5</sup> In return for retail pricing flexibility, Verizon agreed to continue to make the platform of network elements available to competitors to serve mass-market customers, which the NYPSC correctly defined as customers with 18 or fewer lines at a particular location. The New York settlement provides a basis on which sustainable local competition can be built. Sustainable local competition is not possible if incumbents are required to implicitly subsidize some customers, as Congress recognized in adopting the universal service provision and as the NYPSC recognized by providing Verizon with pricing flexibility. But sustainable local competition also is not possible if new entrants are required, as you put it, to “amass[] staggering amounts of debt in building nearly-identical networks” and then hope that, having built them, customers will come.<sup>6</sup> The NYPSC also recognized, however, that carriers will not create a wholesale market for switching, for example, if they cannot connect their switches to the incumbent’s loops in high volumes and at low costs. Thus, the NYPSC also began a proceeding to investigate the barriers to doing so.

Other states have adopted similar regulatory approaches. Earlier this year, the Texas Public Utility Commission ordered statewide availability of unbundled local switching to serve the mass market, based upon its own independent analysis that entrants cannot serve the mass market without it.<sup>7</sup> In the wake of aggressive UNE Platform implementation by the Michigan Public Service Commission, Michigan consumers saw their first significant rate decrease in years – from \$21 to \$14.<sup>8</sup> And competition in Illinois was growing faster than in nearly any other state in the second half of last year, in the wake of state legislation that ensures competitive unbundled access statewide as part of Ameritech’s alternative regulation plan.<sup>9</sup>

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<sup>3</sup> *Id.* at 14.

<sup>4</sup> *Id.* at 15.

<sup>5</sup> *Verizon New York*, Order Instituting Verizon Incentive Plan, Case 00-C-1945 (issued Feb. 27, 2002).

<sup>6</sup> Chairman Powell’s Senate testimony at 8.

<sup>7</sup> Arbitration Award, *Petition of MCIMetro*, Texas PUC Docket No. 24542 (May 1, 2002).

<sup>8</sup> “Competition keeps calling, but Bells resist,” *USA Today* (July 17, 2002).

<sup>9</sup> See 220 ILCS 5/13-801(a).

All of these states have facilitated “Customers-First” entry strategies, which Z-Tel has adhered to from the start.<sup>10</sup> Rather than attempting to duplicate the incumbent’s costly networks, Z-Tel invested more than \$100 million in developing innovative software that provides options many customers find attractive.<sup>11</sup> Z-Tel could not have developed that software if it had been required to spend its money duplicating the incumbents’ facilities.

The day cannot come too soon for Z-Tel when the “efficient wholesale market” for local services that you envision<sup>12</sup> exists. Z-Tel currently provides service by using the innovative advanced features it self-provisions, the efficient wholesale market that exists for interexchange service, and its only feasible source of local facilities, the incumbents’ network elements. As soon as an efficient wholesale market for switching and transport exists – one that can be feasibly connected to incumbent loops in high volume and at a low cutover cost – Z-Tel will use it. However, the current practice of manually provisioning cutovers is one of the many barriers to creation of this market.<sup>13</sup>

Policies that attempt to mandate the construction of local facilities before operational changes are made to address the “hot cut” bottleneck and additional transport costs will backfire. They will lead either to another round of field of dreams investment or -- more likely, since capital markets have learned their lesson -- to no investment in switching and transport facilities to serve the mass market where these hidden barriers would continue to exist.

The approach advocated by the incumbents in the Triennial Review is designed, as you put it, to “stifle[]” the development of local competition “at the gate.”<sup>14</sup> The incumbents understand that capital markets will no longer fund the “build it and they will come” business models you referenced in your testimony. Indeed, whatever the plausibility of that approach for long-haul and metro net investments -- where most of the prior investment occurred -- it has even less plausibility with respect to investment to construct redundant elements needed to provide local service: as the Supreme Court stated, “duplication of [those bottleneck elements] is neither

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<sup>10</sup> See “Putting the Horse before the Cart: *The History and Future of the UNE Platform*,” Attachment 11 to Z-Tel’s Comments in the Triennial Review proceeding, CC Docket 01-338 *et al.* (February 2001).

<sup>11</sup> See Declaration of Robert A. Curtis on Behalf of Z-Tel Communications, Inc., ¶ 4, Attachment 3 to Z-Tel’s Comments in the Triennial Review proceeding, CC Docket 01-338 *et al.* (filed April 5, 2002).

<sup>12</sup> Chairman Powell’s Senate testimony at 15.

<sup>13</sup> For this reason, the Commission should, in the Triennial Review, actively investigate AT&T’s electronic loop provisioning (ELP) proposal and seek to put in place policies that would facilitate its deployment.

<sup>14</sup> Chairman Powell’s Senate testimony at 15.

likely nor desired.”<sup>15</sup> The incumbents know that if the Commission makes new entrants self-provision network elements in order to provide local service, competition will not develop for mass-market customers and the competitive options that have developed for those customers will disappear.

But as Verizon’s agreement to the settlement approved by the NYPSC shows, it is possible to provide competitive choices to consumers and satisfy incumbents’ legitimate interests as well. New York’s approach has fostered “effective and sustainable competitive entry”<sup>16</sup> by providing expanded opportunities for new entrants to use the platform of network elements while giving retail pricing flexibility to incumbents. New York, of course, has long been a leader in promoting the development of competitive options.<sup>17</sup> Your most recent *Local Competition Report* documents that consumers in New York have more desirable competitive options than consumers in any other state.<sup>18</sup> Other states, like Texas, Illinois and Michigan, are seeing an explosion in competitive choice and innovative ILEC service packages as a result of implementing a “Customers-First” regulatory paradigm.<sup>19</sup>

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<sup>15</sup> *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1675 (2002).

<sup>16</sup> *Id.*

<sup>17</sup> The Commission repeatedly has recognized New York’s leadership role. In granting the first section 271 application, for example, the Commission recognized that it was building “on the tireless efforts of the New York Commission, which has worked long and hard with Bell Atlantic and competitive local exchange companies (LECs) to ensure that local markets in New York are open to competition.” *In re Bell Atlantic New York 271 Application*, 15 FCC Rcd 3953 ¶ 2 (1999).

<sup>18</sup> See “Local Telephone Competition: Status as of December 31, 2002,” Industry Analysis and Technology Division, Wireline Competition Bureau (July 2002), Table 6 (showing that CLECs have a 25% market share in New York, higher than their share in any other state and higher than the nationwide average of 10%).

<sup>19</sup> Table 6 of the latest *Local Competition Report* shows that those three states are each in the top ten in terms of CLEC market share.

As you testified, "State and Federal policymakers" must work hard to create the "regulatory foundations for communications services growth and competition."<sup>20</sup> The states are pointing the way: the Commission should follow their lead and adopt an approach that will allow new entrants to gain customer bases using the UNE Platform, while encouraging states to provide retail pricing flexibility and rate rebalancing to incumbents. Only then will the conditions for sustainable competitive entry and the development of an efficient wholesale market begin to be in place.

Sincerely,

/s/

Robert A. Curtis  
President, Z-Tel Network Services

/s/

Thomas M. Koutsky  
Vice President, Law and Public Policy

cc: Commissioner Kathleen Q. Abernathy  
Commissioner Michael Copps  
Commissioner Kevin J. Martin  
Christopher Libertelli  
Mathew Brill  
Jordan Goldstein  
Daniel Gonzalez  
Dorothy Attwood  
Jeffrey Carlisle  
Michelle Carey  
Tamara Preiss  
Brent Olson

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<sup>20</sup> Chairman Powell's Senate testimony at 14.